In the Supreme Court of the United States

OCTOBER TERM, 1924

BENJAMIN W. MORSE, APPELLANT
v.
THE UNITED STATES
No. 597

HARRY F. MORSE, APPELLANT
v.
THE UNITED STATES
No. 598

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT

The two appellants, with several others, were jointly indicted in the Southern District of New York for conspiring to use the mails to execute a scheme to defraud. (Secs. 37 and 215, Criminal Code.) Both appellants were apprehended in that district after contesting removal proceedings instituted in Massachusetts against Benjamin W. Morse (appellant in No. 597) and in Connecticut against

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Harry F. Morse (appellant in No. 598). They applied to the District Court for writs of habeas corpus, which were granted. At the subsequent hearing, however, the writs were dismissed; and from the orders of dismissal these appeals were taken. The District Judge, in allowing the appeals, issued a supersedeas on the express condition that every effort be made to expedite the hearing of the appeals, in order that the trial of the main cause should not be unduly delayed.

Both appeals involve substantially the same facts and raise identical questions of law. On motion of the United States, this Court, on October 27th, 1924, ordered them consolidated and advanced.

These appeals have been brought direct to this Court under Section 238 of the Judicial Code, on the ground, apparently, that the cases involve "the construction or application of the Constitution of the United States."

A careful examination of the record, however, will show not only that it presents no constitutional question of any sort, but also that the appeals are altogether without merit and should be dismissed. The petitions for habeas corpus do not mention the Constitution at all. But the appellants seek to inject a constitutional question by means of general allegations, contained in their affidavits filed in support of the petitions, to the effect that their arrest and detention are contrary to due process of law. These allegations were carefully considered by the District Court and were held to be without merit.

ARGUMENT

I

The appellants claim that they were privileged from arrest while passing through the Southern District of New York en route to the District of Columbia, where they were to stand trial on an indictment for another offense (conspiracy to defraud the United States, Rec. Tr. pp. 3–4).

Suitors and witnesses are, under certain circumstances, privileged from arrest in *civil* proceedings; and the privilege protects them *eundo, morando, et redeundo*. But there is no corresponding protection from arrest in *criminal* proceedings. Every person found within the territorial limits of a jurisdiction (whether those limits be the boundaries of a state or of a Federal district) is amenable to criminal process from the courts of that jurisdiction, regardless of how or why he comes thither. To this rule there are a few well-defined exceptions. One is to be found in the immunity conferred by international law upon foreign sovereigns and diplomatic officers; another, in the right of a person lawfully extradited for one crime to be tried for that crime only and not for another. *United States* v. *Rauscher*, 119 U. S. 407. With these exceptions, at the trial of a criminal case, the court will never stop to consider the manner in which the prisoner is brought before it. He may have been kidnapped or brought within the jurisdiction by a trick. But such circumstances will not entitle him either to an acquittal or to a favorable

judgment on direct appeal. Neither will they entitle him to a discharge upon habeas corpus, either before or after trial.

Pettibone v. *Nichols*, 203 U. S. 192.
Mahon v. *Justice*, 127 U. S. 700.
Ker v. *Illinois*, 119 U. S. 436.
People v. *Rowe*, 4 Parker Cr. (N. Y.) 253.
Dows' Case, 18 Pa. St. 37.
ex parte Scott, 9 B. & C. 446.

The present case can not be distingished on the ground that the appellants had already been indicted in the District of Columbia, that they had been admitted to bail there, or that they were actually proceeding thither to stand trial when they were arrested. There is no rule of comity which prevents the United States from prosecuting a defendant in one district merely because he has already been indicted in another. *Peckham* v. *Henkel*, 216 U. S. 482. The fact that the appellants had been admitted to bail in the District of Columbia or that their case had been set for trial there does not place them in the actual custody of the Supreme Court of that District, or prevent other courts from acquiring jurisdiction of their persons and punishing them for crimes committed elsewhere. To hold otherwise would mean that a person charged, for example, with larceny in New Jersey, and admitted to bail there, would be at liberty to commit murder in New York and arson in Massachusetts and yet avoid punishment. Neither New York nor Massachusetts could arrest or try him so long as the New Jersey indictment was out-

standing. Or again, a person might commit murder in New York and might then at once flee into New Jersey and procure his own arrest and indictment there for some minor offense. Having been admitted to bail in New Jersey, he could then return to New York, where he would be able to postpone his trial for murder for just so long a time as he could induce the New Jersey prosecutor to delay action on the minor charge.

Such reasoning is absurd. Admission to bail in one jurisdiction, even coupled with the fact that trial is about to be held there, confers no immunity from arrest or prosecution in another. The appellants in this case were permitted by their sureties to leave the District of Columbia and to travel at large in the United States. They were free to come and go; but this does not mean that they were privileged from arrest wherever they might be found. Moreover, this is not an action on the bail bond in the District of Columbia. In such an action the sureties might or might not be entitled to relief; but the appellants themselves cannot now complain. Being accused of different crimes in different districts, they can not elect where they are to be tried first or rely upon bail or upon a pending trial in one district as conferring immunity from arrest in another.

Peckham v. *Henkel*, 216 U. S. 482.
Haas v. *Henkel*, 216 U. S. 462.
Taylor v. *Taintor*, 16 Wall. 366.
Ex parte Marrin, 164 Fed. 631.
In re Fox, 51 Fed. 427.

II

It is also contended that the decision of the United States Commissioner in Massachusetts and of the District Court in Connecticut in favor of the appellants on removal proceedings establish the insufficiency of the indictment and bar the United States from proceeding further against them in the Southern District of New York. There is no reasonable basis for this contention. A decision in removal proceedings is not in any sense *res adjudicata* and does not bar further proceedings arising out of the same cause, nor is the accused put in jeopardy. He may be committed a second time upon a complaint charging the same offense in identical form. If he is subsequently apprehended in the district to which it was sought to remove him, he may be lawfully tried there, notwithstanding the failure of the removal proceedings.

Collins v. *Loisel*, 262 U. S. 426.
Bassing v. *Cady*, 208 U. S. 386, 391.
Commonwealth v. *Sullivan*, 156 Mass. 487.
People v. *Dillon*, 197 N. Y. 254.

The writ of habeas corpus can not be made to perform the functions of a writ of error after conviction; nor can it be used to release a prisoner in advance of trial, merely because the indictment may be inartificially drawn. The construction and interpretation of the indictment are for the trial court alone. They are not proper matters of inquiry on habeas corpus. The ruling of the District Court for the Southern District of New York was correct on

this point. And that Court was in no sense bound by the prior adjudications of the District Court in Connecticut and of the Commissioner in Massachusetts.

Glasgow v. *Moyer*, 225 U. S. 420.
Matter of Gregory, 219 U. S. 210.
Hyde v. *Shine*, 199 U. S. 62.
Benson v. *Henkel*, 198 U. S. 1.
Benson v. *Palmer*, 31 App. D. C. 561.

III

The appellants further argue that the bench warrant under which they were arrested was void at the time of the arrest, and that it therefore furnishes no justification for their detention. They contend that the same bench warrant (or a copy of it) had been used as the basis of the removal proceedings in Massachusetts and Connecticut, and that upon the termination of the removal proceedings the force of the warrant was spent.

This argument can not be sustained. It is true that under certain circumstances a warrant may lose its force when a return is made. But the record herein does not show that any return was ever made. On the contrary, it discloses that the warrant was still in the hands of the Marshal for the Southern District of New York, and that the Marshal executed it by arresting the appellants within that District.

The fact that a judge or commissioner in another District had previously decided against the Government in removal or habeas corpus proceedings can-

not operateas a binding decision on the invalidity of the indictment; neither can it operate to discharge a bench warrant which is based upon the indictment. That warrant and indictment did not and could not constitute the *process* under which the appellants were arrested in Massachusetts and Connecticut. They constituted merely the *evidence* upon which an application for removal might be made. The warrant was returnable before the District Court which had issued it. Its purpose was to compel the appellants to answer to the indictment there found against them. Its force was not spent by the removal proceedings. It continued in force until it had been returned to the Court which issued it, and until the appellants had been brought thither.

Bassing v. *Cady*, 208 U. S. 386.
Greene v. *Henkel*, 183 U. S. 249.
Benson v. *Palmer*, 31 App. D. C. 561.

IV

It is apparent then that this appeal raises no constitutional questions, and so can not be maintained in this Court.

Didato v. *Hecht*, in this Court, Nov. 24th, 1924.
Heitler v. *United States*, 260 U. S. 438.
Childers v. *McClaughry*, 216 U. S. 139.

Under the Act of September 14, 1922 (42 Stat. L. 837, Judicial Code, S. 238 a.), this Court has the power to transfer the appeal to the Circuit Court of Appeals, instead of dismissing it. This was done in

the cases of *Didato* v. *Hecht* and *Heitler* v. *United States, supra.*

It is respectfully submitted, however, that in the present case no order of transfer should be made. The appeals should instead be dismissed.

It is now nearly three years since the appellants were indicted in the Southern District of New York. A supersedeas was granted by the District Court in the present appeals on the express condition that the appeals should be expedited.

If the appeals are now transferred to the Circuit Court of Appeals, further delays will ensue in the trial of the main case against the appellants and the others who have been indicted with them. The points raised by the appellants are frivolous, and are in no event open on habeas corpus. They are, without exception, questions which are proper for the trial court alone, or, after conviction, for an appellate court on writ of error; and the Circuit Court of Appeals, if the cases were now transferred to it, would undoubtedly so hold.

This court possesses the power to dismiss an appeal instead of transferring it. The power has not been abridged by the enactment of S. 238-a of the Judicial Code, for that section merely provides that where an appeal has been taken to the wrong court it shall not "*for such reason*" be dismissed. The purpose of the Section was to benefit litigants whose appeals raised questions which were arguable in *some* court, but who had mistakenly chosen the wrong court. But in the present case the points

raised by the appellants can not be argued on habeas corpus either here or in the Circuit Court of Appeals; and an order of transfer would achieve no useful result, but would serve rather to delay still further the trial of the main issue. An order of dismissal should be made, notwithstanding S. 238–a, wherever this Court is of opinion that an appeal is groundless, frivolous, or vexatious, or where it is intentionally taken to the wrong court for purposes of delay, or where it can not be maintained in any court at the existing stage of the proceedings.

V

The points raised by both appellants are without merit. They involve no constitutional questions, and so can not be argued in this Court. They involve no questions which are open on habeas corpus and so can not be argued in the Circuit Court of Appeals. It is therefore respectfully submitted that both of these appeals should be dismissed.

JAMES M. BECK,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant Attorney General.

JANUARY, 1925.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1924.

JOHN MULLEN, ANDREW WYTOW, VALENTINE PISARSKI, JENNIE MILLER, MATT BUCONICH, JOE LAMONT, LEWIS L. CAHN and VITO SCHIRALLI,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

No. 837

Petition and Brief for Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

C. B. TINKHAM,
Attorney for Petitioners.

A. E. TINKHAM,
F. R. MURRAY,
Of Counsel.

BARNARD & MILLER PRINT, CHICAGO.

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Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

No. .....

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, John Mullen, Andrew Wytow, Valentine Pisarski, Jennie Miller, Matt Buconich, Joe Lamont, Lewis L. Cahn and Vito Schiralli, respectfully represent that they were among seventy-four persons indicted on the 13th day of January, 1923, in the District Court for the District of Indiana, upon four counts, each charging conspiracy to commit an offense against the United States in violation of the National Prohibition Act. The first count charges conspiracy to transport intoxicating liquor; the second count, conspiracy to sell intoxicating liquor; the third count, conspiracy to maintain common nuisances, to-wit: places where intoxicating liquors were to be manuafctured, sold, kept and bartered for beverage

purposes; the fourth count, conspiracy to manufacture, transport, sell, possess for sale, and barter, intoxicating liquors. (Tr., 1 to 21.)

Sixty-three of these defendants, including your petitioners, plead not guilty, and fifty-five of them, including your petitioners, were found guilty by the jury. One of these was granted a new trial and later discharged, and two were discharged on Motion in Arrest. (Tr., 68.) The remaining fifty-two defendants were sentenced by the court, and your petitioners received the following sentences:

John Mullen	3 months	no fine
Andrew Wytow	6 months	$500.00
Valentine Pisarski	4 months	100.00
Jennie Miller	3 months	100.00
Matt Buconich	4 months	100.00
Joe Lamont	4 months	100.00
Lewis L. Cahn	4 months	100.00
Vito Schiralli	4 months	100.00

(Tr., 80.)

All of the defendants so sentenced lived in the City of Gary, Lake County, Indiana. Your petitioners John Mullen and Andrew Wytow were police officers of said city. The remainder of your petitioners were, at some time during the period covered by the indictment, operators of so-called soft drink parlors in said city.

Writs of error were taken out by each of your petitioners, and it was ordered by the court on stipulation between the plaintiffs in error and the United States attorney that the entire record as to all of said plaintiffs in error be included in one transcript, and that each of said plaintiffs in error be permitted to be heard in the Circuit Court of Appeals for the Seventh Circuit on the transcript so prepared. (Tr., 83 to 86.)

Before the beginning of the trial in the District Court your petitioners filed written motion for a continuance

of the trial of said cause, which motion was based upon the publication in the leading newspapers of Indianapolis, and elsewhere over the district, of interviews given out by the United States attorney on the day before and on the same day the trial began (Tr., 90), which motion was by the court overruled, to which ruling exception was duly taken. (Tr., 102.)

Your petitioners also filed before the beginning of the trial a written motion to discharge the panel, which motion was based on the same grounds as the motion for continuance (Tr., 103), such motion was by the court overruled, to which ruling exception was duly taken. (Tr., 115.)

At the close of all of the evidence, your petitioners separately moved the court to direct the jury to find each not guilty, the ground of which motions was that the evidence was insufficient to support a conviction. The court overruled such motions, and your petitioners duly excepted thereto. (Tr., 1119.)

The above alleged errors were duly assigned in the various assignments of error filed by your petitioners. (Tr., 1337, 1346 and 1353.)

For convenience, your petitioners may be divided into two groups or classes, as follows:

1. John Mullen and Andrew Wytow, police officers of the City of Gary.

2. Valentine Pisarski, Jennie Miller, Matt Buconich, Joe Lamont, Lewis J. Cahn and Vito Schiralli, each of whom at some time during the period covered by the indictment, operated so-called soft drink parlors in the City of Gary.

The following are references to the facts concerning each of your petitioners as disclosed by the evidence:

JOHN MULLEN

GOVERNMENT'S EVIDENCE.

Oscar L. Sprague, Transcript p. 334.
James E. McPherson, Transcript p. 336.
William H. Matthews, Transcript p. 237.

EVIDENCE ON HIS OWN BEHALF.

John Mullen, Transcript pp. 362 to 365.

ANDREW WYTOW

GOVERNMENT'S EVIDENCE.

Horace Lyle, Transcript p. 321.
Olaf Schonhult, Transcript p. 385.
William Hays, Transcript p. 407.
Mary Gibbs, Transcript p. 431.
Aleck Mouroutis, Transcript p. 433.

EVIDENCE ON HIS OWN BEHALF.

Andrew Wytow, Transcript pp. 865 to 869.

VALENTINE PISARSKI

GOVERNMENT'S EVIDENCE.

Roy Wright, Transcript pp. 271, 272 and 274.
William E. Hindel, Transcript p. 436.
Fred T. Davenport, Transcript p. 441.

No evidence introduced in behalf of the petitioner.

JENNIE MILLER

GOVERNMENT'S EVIDENCE.

Harold Cross, Transcript p. 245.
Roy McVey, Transcript p. 255.
Roy Wright, Transcript pp. 266 to 275.

No evidence introduced in behalf of the petitioner.

Matt Buconich

GOVERNMENT'S EVIDENCE.

Roy Wright, Transcript p. 274.
Exhibit 13e, Transcript p. 518.

No evidence introduced in behalf of the petitioner.

Joe Lamont

GOVERNMENT'S EVIDENCE.

Harold Cross, Transcript pp. 244 and 245.
Louis Wien, Jr., Transcript p. 258.
Roy Wright, Transcript p. 267.
Exhibit 21, Transcript p. 299.
Olaf Schonhult, Transcript p. 384.
I. A. Horner, Transcript p. 440.

No evidence introduced in behalf of the petitioner.

Lewis L. Cahn

GOVERNMENT'S EVIDENCE.

Louis Wine, Jr., Transcript pp. 258 and 259.
James G. Browning, Transcript pp. 315 and 316.
Philip Ukman, Transcript pp. 447 and 448.
Roy Wright, Transcript pp. 263 and 264.
Olaf Schonhult, Transcript p. 385.
I. A. Horner, Transcript p. 440.

No evidence introduced in behalf of the petitioner.

Vito Schiralli

GOVERNMENT'S EVIDENCE.

Roy Wright, Transcript p. 269.
Horace Lyle, Transcript p. 321.

No evidence introduced in behalf of this petitioner.

Your petitioners urge the following questions of law:

I.

The inevitable prejudice created by the highly inflammable interviews given out by the district attorney and published in various leading newspapers in the City of Indianapolis, and elsewhere in the district, on the day before the trial began and on the day the jury was sworn to try the cause and also during the trial, which question was raised by the motion for continuance and the motion to discharge the panel hereinbefore mentioned. (Tr., 90 and 103.)

II.

The impossibility of a fair and impartial trial with such an unprecedented number of parties defendant—an agglomeration of defendants which could only mean confusion and a fatal obstacle to a properly considered verdict, even in the absence of the above alleged prejudice.

III.

The unlawful inferences necessarily drawn by the jury in order to arrive at a verdict of guilty, which question was presented to the trial court by motions of your petitioners at the close of all the evidence to direct a verdict for them. (Tr., 1119.)

IV.

The position of the Circuit Court of Appeals, as disclosed in its opinion, that it will not consider any distinction between "evidence" and "substantial evidence." (Tr., p. 1416.) This is not in conformity with decisions rendered in other Circuits, and in the interest of uniformity of decision on this important subject, this question should be considered.

Considering the questions above urged in consecutive order, we first take up the alleged prejudice of the jury on account of the publication of the interviews given out by the district attorney who had charge of the prosecution for the government.

Point I.

This question was raised in the trial court, first, by a motion for continuance, and second, by a motion to discharge the panel, the published interviews being the grounds for both motions. (Tr., 90 to 115.) Excerpts from these newspaper articles also appear in a note to the opinion handed down by the Circuit Court of Appeals. (Tr., 1426.)

The Circuit Court of Appeals, in its opinion, declares that this is the most serious question in the case, and in this connection uses the following language:

> "The most serious assignment of error—one in which all defendants join—arises out of the publication of certain newspaper articles. While the court was engaged in the trial of the case, newspapers of Indianapolis, following an altogether too common practice, also tried the case, acting as investigator, prosecutor and judge. Whether the verdict following the long trial shall now be set aside and a new trial ordered, and the large expense to the government and defendants duplicated, depends upon our conclusion respecting the effect of these newspaper articles." (Tr., 1425 and 1426.)

It is not infrequently the case that where causes of action of more or less prominence come on for trial, comments may be found in the public press purporting to disclose some of the facts involved; **but never before in the history of trials can we find that the public prosecutor has directly charged in public interviews on the eve of trial that the defendants have been guilty of mur-**

dering the chief witness for the prosecution in order to still his accusing tongue.

The unique feature here is that this grave charge was hurled at these defendants by the *district attorney* whose opportunities are unsurpassed for procuring information, the accuracy of which is usually accepted by the general public. Are not the following words startling when coming from the district attorney in charge of the prosecution on the day before the trial and on the day the trial began and afterward?

> "I am not surprised that Monte has been killed, and have been expecting to hear of just such violence. * * * The action only bears out my belief that the Lake County defendants are a desperate bunch, and that the government must not spare any pains to safeguard the witnesses and agents who are connected with the case which comes up for trial Wednesday morning before Judge Geiger."

These words are by no means all that he was quoted as saying, but they form the fatal focus of the vicious thrust. If this had been an accusation of the commission of an offense not involved in the trial of the indictment and the commission of which would carry no direct significance as to the guilt or innocence of the accused, it would not have borne such grave consequences, but it was much more than this. If the charges made by the district attorney were true, the guilt of the defendants of the offense described in the indictment would be all but conclusive. The general public believe the district attorney to be a man of unusual qualities and unquestioned integrity. Men, therefore, give more than ordinary credence to information emanating from such a source. In the opinion handed down by the Circuit Court of Appeals such conduct on the part of the district attorney is very properly condemned (Tr., 1429), and then such opinion undertakes to relieve the district attorney in the present case by saying:

> "It should be said of the present case that it does not appear that the district attorney was guilty of such conduct. The furtherest the affidavits go is to suggest that newspapers put statements in the mouth of the government attorney, which he did not deny." (Tr., 1430.)

But is it not true that his silence speaks as loudly as an admission? He had full opportunity to say to this jury that the purported interviews published by the various newspapers were false. If they were false, then, in view of his failure to deny them is not the conclusion justifiable, yes, actually compelling, that he wished whatever influence they might carry to continue throughout the trial in order to aid in a conviction? In such case, his failure to deny is the more reprehensible. During the oral argument in the Circuit Court of Appeals, presiding Judge Alschuler asked the district attorney if he had ever denied these interviews, and in answer he made the mere statement that he had not denied them. In all fairness we can place no other construction upon this than an admission that such interviews were given out by him. We, therefore, venture the statement that the portion of the opinion of the Circuit Court of Appeals dealing with the jury question should not rest upon or be at all supported by the conclusion made therein, to-wit:

> "That it does not appear that the district attorney was guilty of such conduct." (Tr., 1430.)

If these statements were false and the district attorney had spurned winning a conviction through unfair methods, would he not immediately have used every means in his power to refute them, and would he not have hastened to embrace the first opportunity to announce to the court and jury that they were false? We stress this subject for the reason that from the language of the opinion of the Circuit Court of Appeals we are led to

believe that its decision upon the jury question was not uninfluenced by the conclusion that the district attorney was not "guilty of such conduct."

Furthermore, these newspaper articles carried the same sting whether they were true or false in the absence of a denial from the district attorney. The average juryman would place some credence in these statements when the district attorney failed to deny them while standing before him on the *vior dire.*

Concerning the examination of the jurors by the defendants the opinion of the Circuit Court of Appeals seems to lay some stress upon the fact that the defendants did not exhaust all of their peremptory challenges. (Tr., 1430.) The defendants certainly would not be expected to ignore these newspaper publications on the *voir dire.* The defendants had, without success, resorted to every means in their command, in so far as the court was concerned, by a motion for a continuance and a motion to discharge the panel. In order to further protect themselves they followed a very proper and natural course, and that which seemed at the time to be a most prudent one, in examining each juror on this subject. It could not safely be ignored by the defendants, and thus reference to the statements of the district attorney made to the press were injected into the examination. Hence we do not believe it can reasonably be said that such action should militate against the defendants. They were not responsible for the situation. The responsibility rested with the district attorney. Nevertheless, the reference to the subject on the *voir dire* refreshed the minds of those who had read the articles and called it to the attention of those who had not. In this way the prejudicial effect of the subject would linger with every juror no matter how many talesmen were called. It became apparent during the examination that it was use-

less to further "strike" preemptorily for the reason that invariably the juror would say that he could try the case impartially notwithstanding that he had read the newspaper articles. Not one of the jurors examined who had read these articles would admit that he could not try the case impartially. Therefore, it seems quite apparent that any further exercise of the peremptory challenge would have accomplished nothing but a waste of time. There is one element in this connection which the opinion of the Circuit Court of Appeals seems to entirely overlook, but we believe it to be an important one which has been almost universally recognized not only by the courts, but in all human affairs. We refer to the fact that men are often unconsciously influenced by prejudice. It is a well known fact that "Some of the worst enemies of the man who is seeking for the truth will appeal to him as old friends in whom he has great confidence, and that one of the worst of these enemies is prejudice." The inflammatory and prejudicial nature of these interviews cannot be denied, and notwithstanding that each juror stated that he could try these defendants impartially, still the fact remains that they were exposed to this improper influence. The very nature of the matter is such as would create a presumption that the verdict was influenced thereby.

There is another important element to be considered in determining the effect of the answers of the jurors to the questions regarding this prejudicial matter. That is the element of pride found in every human being which repels him from odious comparison with his fellows. The first juror examined on this subject stated that he could try the cause fairly notwithstanding the fact that he had read the articles. Is it not true that the next juror examined would hesitate to say that he could not do so, especially after a rather insistent interrogation

by the court? The juror would feel that his intelligence was in the balance and his pride would dictate the answer, and not his conscience.

The opinion of the Circuit Court of Appeals further states that the defendants "challenged no juror for cause because he had read such articles." (Tr., 1430.) We submit that it is plain to be seen from the record of the *voir dire* that such a challenge would have been promptly denied by the court and that it is not unlikely that counsel would have drawn a reprimand from the court for his pains. It should also be recognized that such action would have been poor trial strategy, for the defendants felt that they could not carry the additional prejudice that might develop in the mind of a juror unsuccessfully challenged. The opinion further refers to the fact that the defendants peremptorily struck some who had not read the articles and concludes from this that the defendants "seemed not concerned about the subject." We insist that the premise does not justify the conclusion. This subject was not the only one that the defendants had in mind in the examination of the jurors. However, it is very apparent that it was uppermost in their thoughts. It is not strange that some jurors were challenged for other reasons. In so far as the one juror is concerned who had read the articles and who is mentioned in the opinion (Tr., 1430) as having been accepted without examination, we can only say that it may have been an oversight or it may have been considered a useless task in view of other examinations.

The opinion further states:

> "In fact many of the defendants did not join in the motions for a continuance, change of venue, or join in the demand for a new panel, and certainly as to them there exists no assignment of error. Moreover, the court was not justified in ignoring their wishes when it denied a continuance." (Tr., 1430.)

There were only two motions made in this connection—a motion for a continuance and a motion to discharge the panel. There was no motion for a change of venue. Forty of the sixty-three defendants joined in these motions. Only fifty-one of the sixty-three defendants were represented by counsel as is shown by the appearances entered. (Tr., 88 and 89.) Therefore, all but eleven of the defendants represented by counsel joined in these motions. It should be remembered that the determination on what steps to take regarding these articles and the preparation and signing of the motions had to be hastily done. The articles first appeared on the morning before the trial began, again in the late afternoon, and again on the morning of the first day of trial. There was no time to look up the defendants who were not represented, and counsel who did not sign were not available at the time. The truth is that no defendant refused to sign, nor did any defendant express unwillingness to join in the motions. We do not believe that the Circuit Court of Appeals is justified in the conclusion that any of the defendants were opposed to these motions. Furthermore, can it be said that, even though the few defendants who did not join refused to do so for reasons of their own not disclosed by the record, the defendants who did join in the motion should be forced to trial against a prejudice for which they were not responsible? Can it be reasonably said that a small minority of this great body of defendants, its very numbers casting a shadow on the justice of the verdict, should deprive the large majority of the right to have their guilt determined in the manner prescribed by law? The trial court did not know the wishes of this small minority, and did not inquire as to what they were, nor were they mentioned in the rulings on these motions. The court apparently ruled on what he considered at the time as the true merit contained in them.

We therefore submit that the conclusion that "the court was not justified in ignoring their wishes when it denied a continuance" is not a proper one, and if it was intended in any way to support the affirmance of the trial court, such support should be removed.

There further appears in the opinion on this subject the following:

> "Had the case been continued, the effect of the murder of the government's principal witness would have doubtless been as impressive at a later date as it was at the time of the trial." (Tr., 1430.)

It can hardly be conceived how this statement can be justified in view of the inflammatory and prejudicial character of the newspaper articles. This statement entirely ignores the fickleness of public sentiment. The case then about to be tried was one which had already been well advertised throughout the state and when the startling disclosure was made that on the eve of trial the principal witness for the government had been assassinated by this "desperate bunch" of defendants, it spread over the state as fast as modern agencies could carry it. The *voir dire* discloses that several jurors and those examined for jurors had heard it discussed. Public sentiment was momentarily whipped to a foam. Every juryman who responded to the summons and who had read or heard of these articles expected to see an army of armed guards patroling the corridors of the Federal Building during the trial, and a network of guards thrown around all government witnesses and agents to see that no one interfered with them in the progress of the trial, and guards watching all witnesses in the streets and at the local hotels during the trial to see that no harm came to them. These jurymen, to a great extent, saw what they expected to see. They saw guards in the court room and in the corridors of the

Federal Building, just as predicted by the district attorney. This so-called precaution was taken by the district attorney for no other reason, as expressed by him, than to guard against vicious attacks made by these "desperate" defendants. All of this was well known to these jurymen. We are unable to describe the tenseness of the situation and the inflamed atmosphere in which this trial proceeded. In these circumstances, even 30 days' postponement would have relieved the pressure. The apparent frenzy of the district attorney would have been dispelled. The apparent necessity of guards would have been removed. Public sentiment would have greatly subsided. Further knowledge would have been gained by the public in the calm to follow, and these defendants would have appeared at the bar of justice more like ordinary human beings charged with an offense quite common.

The opinion also recites the following:

> "Fortunately, the articles appeared before any jury was drawn. So far as they told of Monte's murder, nothing was related that was not proved at the trial. As to the cause of the murder, and the identity of the murderers, it was not a matter involved in the trial of this case." (Tr., 1430.)

We are not intending to hold the Circuit Court of Appeals too strictly to the literal meaning in any isolated portion of the opinion but we wish to call this court's attention to the fact that the above words do not seem to give proper place to the newspaper articles in so far as such words state that nothing was related therein that was not proved upon the trial. The evidence merely showed that Monte had been killed and nothing more. We believe but one witness was asked regarding this and he testified merely to the fact that Monte had been killed. (Tr., 339.) It will be appreciated by this court that the mere fact that Monte was killed is not in any sense the

basis of this argument. These articles told much more than the mere fact that Monte had been murdered. They accused these defendants of committing the murder in order to protect themselves from his testimony in behalf of the government. They accused these defendants of being a "desperate bunch." They told that his testimony was of great importance and that he was the principal witness for the government, and especially against two of the principal defendants. They told that the district attorney was so convinced of these facts that this murder only bore out his belief that the Lake County defendants were a "desperate bunch" and that the government must not spare any pains to safeguard the witnesses and agents connected with the case. They told that he was going to increase the force and throw around every government witness a network of guards, and take steps to patrol the corridors of the Federal Building during the trial with guards armed with guns and with orders to prevent any tampering with witnesses. They told that these guards would watch all witnesses in the streets and in the local hotels during the trial to see that no harm came to them. They told that guards from other states would be brought into the city and to Gary to prevent any one from approaching the witnesses in any way; that one man was arrested recently at Gary for attempting to tamper with a government witness. They told that Tom Keussis and Mrs. Keussis had been attacked Saturday night at Gary, presumably because of their connection with the case. All of the above was quoted as coming from the district attorney, and the district attorney has never denied such statements. In view of this, can it be accurately said regarding these articles that "so far as they told of Monte's murder, nothing was related that was not proved upon the trial?"

In so far as the opinion states "as to the cause of the

murder, and the identity of the murderers, it was not a matter involved in the trial of this case," it is an accurate statement. We believe, however, that the fact alone that it was not involved in this case is the principal reason for its harm. If these newspaper articles had made mere comments, as are usually made, regarding the real issues involved, it is not likely that much harm or prejudice would have resulted. In this day of universal reading of current news, all intelligent men expect to read some comments in the press regarding the issues involved in a case of any prominence and it could not be said that their mere reading of such would create such a lasting impression upon their minds as to influence them, provided they so testified on the *voir dire*. We are not so zealous in behalf of these petitioners as to say that if this case came within such a class we would be here asking for a rehearing. In the case of *Reynolds* v. *United States*, 98 U. S. 145, cited in the opinion, the plaintiff in error complains of the denial by the trial court of the challenge of a juror for cause simply because the juror in a very meagre examination stated that he had formed an opinion, but that he did not think such opinion would influence his verdict. This was all of the evidence before the court, and the court very properly denied the challenge, and such ruling was affirmed by the Supreme Court. That case is very far from being in a class with the present one. There was nothing in that case that could be said to be at all analogous to the case here.

It is also stated in the above quoted portion of the opinion that "fortunately, the articles appeared before any jury was drawn." As a matter of fact, certain newspapers in Indianapolis published substantially the same articles on the day the jury was sworn to try the cause, to-wit: March 14th. Of course, this is not shown

in the motions and affidavits, but the affidavits do state that such articles will be re-written and re-published in other newspapers over the district. This, of course, is a self-evident fact and follows as naturally as the night follows the day. Therefore, it cannot accurately be said that all such articles appeared before the jury was drawn. Each juror who was sworn to try the cause, and who had not already read such articles, would of course be curious to see them, and human experience tells us that each one of said jurors either read the articles, copies of which were made a part of the motions, or similar articles published thereafter, and in view of the fact that the district attorney failed to deny any of the interviews he was quoted as having made, each juror would very naturally believe that these interviews recited the truth. So that we respectfully take issue with this statement that such articles all appeared before any jury was drawn. Of course, it is true that the showing made in support of the motions does not disclose that any such articles were thereafter published, but it is certainly a legitimate and natural assumption that other newspapers would take it up. We believe that this assumption should be made in favor of the defendants under all of the circumstances in this case. If this court considers the evidence of the *voir dire* in support of the court's rulings on these motions notwithstanding that such evidence was heard after the ruling, then we submit that the plaintiff in error is entitled to some consideration on reasonable assumption. We are convinced that if these articles made a part of the motions had been published after the jury was sworn, there is no doubt that the judgment in this case would have been reversed. This being true, and it being a fair and reasonable assumption that similar attacks were published after the jury was sworn, we believe there should be a like decision on this ques-

tion. The record shows that there were some jurors sworn to try the cause who had not read these articles, but is any man going to say that they did not thereafter read them, or similar articles thereafter published? If so, they fail to comprehend the inquisitive nature of mankind. If the district atorney had seen fit to announce to the court and jury that these interviews did not state the truth, much of the sting of such articles would have been removed. He had an abundance of opportunity to do this during the examination of the jury. If he believed that to do so would have injured the cause of the government, then certainly it would necessarily follow that his failure to do so would injure the cause of the defendants.

The fact that the jury acquitted seven of the defendants charged does not in any sense indicate that its verdict was free from the prejudice fomented by these publications. Four of the acquitted defendants lived in the Town of Hobart, which is ten miles east of the City of Gary; two of such defendants lived in the Town of Crown Point, which is fifteen to twenty miles south of the City of Gary. Only one of such defendants, Joseph De Marti, Jr., lived in the City of Gary, and there was no evidence which would even create a suspicion that he was involved in the conspiracy charged. It is not a mere postulate to say that the verdict was geographical rather than individual, and this alone gives strong support to the contention that the verdict was partial and seriously influenced by the interviews given out by the district attorney.

We fail to find in any reported case where a like situation has been presented to the court for decision, but we believe the following cases on this subject give strong support to the contention of your petitioners:

Mattox v. *United States*, 146 U. S. 140.

Waldron v. *Waldron*, 156 U. S. 361, 383.

Throckmorton v. *Holt*, 180 U. S. 552, 567.
Hopt v. *Utah*, 120 U. S. 430.
Harrison v. *United States*, 200 Fed. 662.
Morse v. *Montana Ore Purchasing Co.*, 105 Fed. 337, 345.
United States v. *Marrin*, 159 Fed. 771, 775.
United States v. *Ogden*, 105 Fed. 371.
Meyer v. *Cadwalader*, 49 Fed. 32.
August v. *United States*, 257 Fed. 388, 392.
Green v. *State*, 53 So. 415.

We earnestly contend that this question is a unique one, remains unsettled, and is of such general public importance as to justify this court in giving it consideration. The importance of this question is by no means confined to the litigants here involved.

Point II.

A fair and impartial trial was not possible with the unprecedented number of parties defendant, even in the absence of the prejudice created by the published interviews of the United States attorney in charge of the prosecution. In support of this fact we point to the unlawful and violent inferences which the jury must have drawn in order to render a verdict of guilty against numerous defendants. (See next Point.)

Little need be said regarding this subject because it seems to us a self-evident fact that such an agglomeration of defendants is a fatal obstacle to a properly considered verdict. Where there are so many individual defendants and groups of defendants, each being in an entirely different situation, the field of evidence has almost no boundaries. Fatal prejudice is inevitable in such a case. We recall that in the case of *Heitler* v.

United States, 274 Fed. 401, cited in the opinion of the Circuit Court of Appeals, his Honor Judge Evans, remarked that: "The present trial convinces the court that thirty defendants is a large number to try at one time."

We cannot here point to precedent, for we are unable to find such in any reported case.

Point III.

Unfair and unlawful inferences must have ben drawn by the jury. We do not here ask this court to weigh the evidence for we are well aware that it cannot do so. We do ask, however, that the legal sufficiency of the evidence be given consideration in connection with the other questions of law herein presented. If it were not for the fact that such other questions have an intimate bearing upon this point we would not have the temerity to present it in this court. The question we wish to present is whether the material allegations of the indictment are supported by substantial evidence. There is no direct evidence against your petitioners named in the second group of the classification hereinabove made, except that they sold intoxicating liquor.

The opinion of the Circuit Court of Appeals very properly recites: "It is true if there be no other evidence than the mere sale of liquor, the conspiracy is not shown. *Heitler* v. *United States*, 24 Fed. 401." (Tr., 1419.)

Then the opinion asks: "But did these defendants merely sell liquor? What of the evidence showing their campaign contributions, their payment of protection money, and payment of graft money when arrested?" There is no evidence of this kind in the record against your petitioners named in the second group, except that

two of them contributed to the campaign fund of the defendant Roswell O. Johnson in his candidacy for Mayor of the City of Gary—Matt Buconich, $50.00 to his primary campaign fund (Tr., 518) and Joe Lamont, $100.00 to his election campaign fund. (Tr., 299.) The other petitioners in this group did not contribute anything. There is not a scintilla of evidence in the record that any of these petitioners paid protection money or graft money when arrested.

We will not prolong this brief by a recital of all of the evidence against each of these petitioners, but only call attention to the evidence against Vito Schiralli, the last one named in the second group. The evidence against him is as follows:

> On July 15, 1922, a state agent, Lyle by name, bought a half pint of moonshine in this petitioner's place, for which he paid one dollar and then gave it to some government agents who were waiting on the outside, and the latter brought the moonshine into court as evidence. (Tr., 269.) This agent Lyle testified that he bought moonshine there, and that he saw papers and a badge which indicated that Schiralli was a Deputy Sheriff, and that Schiralli told him he had been appointed Deputy Sheriff by Sheriff Olds. Tr., 321.) Schiralli was arrested twice and his place searched twice by the police of the City of Gary. (Tr., 1000.)

This is all of the evidence against this petitioner. His appointment as Deputy Sheriff by Sheriff Olds cannot be evidence of his participation in the conspiracy charged for the reason that the trial court granted the defendant Olds a new trial. (Tr., 68 and 69.) Thus in effect holding that he was not involved in the offense charged, and the government afterward dismissed as to him. The record further shows that most of these petitioners were arrested and their places investigated and searched numerous times by the police of the City of Gary. (Tr., 999 and 1000.)

The evidence does not disclose what disposition was made of their cases when they were arrested, nor does the evidence disclose what fees they paid to their attorney for representing them, nor, in fact, that they hired any lawyer at all. Therefore, there could be no inference that they paid graft money when arrested, or paid for protection.

There being no direct evidence of the offense charged, there can be no legal conviction unless there be circumstantial evidence from which an inference of guilt may be *fairly* drawn. The following seems to be an accurate definition of circumstantial evidence:

> "Evidence that tends to prove a fact in issue by proving other events or circumstances which, according to the common experience of mankind, are *usually* or *always* attended by the fact in issue and *therefore affords a basis for a reasonable inference*, by the jury or court of the occurrence of the fact in issue."

The conviction of these petitioners, or any one of them, should not stand unless the evidence concerning them will square with this definition of circumstantial evidence, and we respectfully submit that it will not.

The rule concerning substantial evidence is applicable to all criminal cases, including those involving violation of the Volsted Act, notwithstanding the desire of the executive department of the government to enforce such law.

Point IV.

The opinion of the Circuit Court of Appeals lays down the rule that that court will not draw a distinction between "evidence" and "substantial evidence." (Tr., 1415 and 1416.) We contend that this is not in conformity with decisions rendered in other Circuits, and

that in the interest of uniformity of decision on this important subject, the question should be here considered.

It is not our intention to place a wrong construction upon any statement made in the opinion of the Circuit Court of Appeals, but we have carefully studied this portion of the opinion and are unable to arrive at any other conclusion than that it states a rule contrary to the decisions of this court and of most, if not all, of the decisions of the other Circuits.

In view of the fact that the evidence concerning many of the defendants below is **not** conflicting and is only of circumstances from which a fair inference of guilt **cannot be drawn**, we are constrained to place a literal construction upon the statement that: **"It is of no avail for counsel to cite cases which have attempted to draw a distinction between 'evidence' and 'substantial evidence.'"** It is true there follows some discussion on the question of weighing conflicting evidence; nevertheless, the rule laid down, as above quoted, must have been applied to numerous plaintiffs in error in this case, including the petitioners named in the second group classification herein made, for in such cases the question of conflict in, and weight of, the evidence is not involved. The only question involved is whether the material allegations of the indictment were supported by the proof of circumstances which afford a basis for a reasonable inference of guilt. Certainly there must be substantial evidence of inculpatory participation in the conspiracy charged.

All of the decisions of this court, so far as we have been able to find, recognize the rule that the evidence inculpating the defendant must be substantial before the court is justified in submitting the issues to a jury. We find this rule announced from the case of *United States* v. *Ross*, 92 U. S. 281 (often cited) to the case of *Stillson* v. *United States*, 250 U. S. 583.

Your petitioners desired to file a petition for rehearing in the Circuit Court of Appeals, but by their oversight, or that of their attorneys who represented them below, it was delayed until too late to do so. It may be here stated that the petitions for rehearing filed in this cause in the Circuit Court of Appeals by numerous plaintiffs in error are still undisposed of in that court.

Your petitioners present herewith as a part of this petition and brief a certified copy of the transcript of the record, including all proceedings in the United States Circuit Court of Appeals for the Seventh Circuit.

In conclusion, we respectfully urge that the questions here presented, when viewed in their intimate relationship with each other, bring before this court a matter of such public import as to call for consideration.

WHEREFORE, in view of the premises, your petitioners pray that this honorable court will grant its writ of *certiorari* directed to the United States Circuit Court of Appeals for the Seventh Circuit, requiring that the record of said cause in the said court and its judgment be certified to this court, and that this court will thereupon proceed to correct the errors complained of, reverse the said judgment and remand the said cause, and give to your petitioners such other and further relief as the nature of the case may require and to the court may seem proper in the premises.

C. B. TINKHAM,
Attorney for Petitioners.

A. E. TINKHAM,
F. R. MURRAY,
Of Counsel.

STATE OF ILLINOIS, } ss:
COUNTY OF COOK. }

C. B. TINKHAM, being first duly sworn, says that he is one of the counsel for the petitioners named in the above and foregoing petition, that he prepared said petition, and that the allegations thereof are true, as he verily believes.

.....

Subscribed and sworn to before me this .... day of ......, 1925.

.....
Notary Public.

My Com. Exp. .....